IN THE

Supreme Court of the United States

OCTOBER TERM, 1959

No. 674

ARTHUR M. McPHAUL,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR PETITIONER

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OPINIONS BELOW

The opinion of the Court of Appeals is reported at 272 F. 2d 627. A copy also appears at page 76 of the Transcript of Record.

JURISDICTION

The judgment of the Court of Appeals was rendered on December 5, 1959 and rehearing was denied on January 4, 1960. The jurisdiction of this Court is invoked pursuant to the provisions of Title 28, U. S. C., Sec. 1254.

The petition for writ of certiorari was granted on March 21, 1960.

QUESTIONS PRESENTED

I.

Where petitioner was tried for criminal contempt for failure to produce subpoenaed records before a Congressional Committee, may his conviction be sustained, consistent with due process and the right to a jury trial, where the Government failed to offer any evidence of the existence of the records or their possession by the petitioner, and the trial court refused to submit to the jury the issue of existence or possession by the petitioner of such records?

II.

Was the subpoena constitutionally objectionable for the reason that it was so broad and all-inclusive as to constitute an unreasonable search and seizure?

III.

Was the evidence sufficient to prove that the subpoenaed records were pertinent to the Committee inquiry?

STATUTES INVOLVED

2 U. S. C. Sec. 192,[1] provides:

> "Every person who having been summoned as a witness by the authority of either House of Congress to give testimony or to produce papers upon any matter under inquiry before either House, or any joint committee established by a joint or concurrent resolution of the two Houses of Congress, or any committee of either House of Congress, willfully makes default, or who, having appeared, refuses to answer any question pertinent to the question under inquiry, shall be deemed guilty of a misdemeanor, punishable by a fine of not more than $1,000.00 nor less than $100.00 and imprisonment in a common jail for not less than one month nor more than twelve months."

The authority of the Committee is contained in H. Res. 5, 79th Cong. 1st Sess. 91 Cong. Rec. 10, 15:

> "The Committee on Un-American Activities, as a whole or by sub-committee, is authorized to make from time to time investigations of (i) the extent, character, and objects of un-American propaganda activities in the United States, (ii) the diffusion within the United States of subversive and un-American propaganda that is instigated from foreign countries or of a domestic origin and attacks the principle of the form of government as guaranteed by our Constitution, and (iii) all other questions in relation thereto that would aid Congress in any necessary remedial legislation."

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[1] Sec. 194, which was also included in the indictment, sets forth the procedure for contempts arising under Sec. 192. Since no procedural issue is raised on this appeal, we do not set forth this section.

STATEMENT OF THE CASE

A sub-committee of the House Committee on Un-American Activities conducted a public hearing in the Federal Building in Detroit, Michigan on February 26th and 27th, 1952.

The hearing was opened by a statement from the Chairman of the Committee concerning some of the general objectives of the Committee and its procedures, in the course of which he said, concerning the purpose of the Detroit hearings:

> "The purpose of this investigation is to determine first, whether there has been Communist activity in this vital defense area (Detroit), and if so, the nature, extent, character and objects thereof" (Tr. 26).[2]

Petitioner was served with a subpoena which stated:

> "You are hereby commanded to summon Arthur McPhaul, 252 East Palmer, Detroit, Michigan, to be and appear before the Committee on Un-American Activities or a duly authorized subcommittee thereof of the House of Representatives of the United States, of which the Honorable John S. Wood is chairman, together with all the records, correspondence and memoranda pertaining to the organization of, the affiliation with other organizations, and all moneys received or expended by the Civil Rights Congress, in Room 737 Federal Building, Detroit, Michigan, Tuesday, February 26, 1952 at the hour of 10 A. M., then and there to testify touching maters of inquiry committed to such committee, and he is not to depart without leave of said committee" (Tr. 6).

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[2] (Tr. — refers to the Transcript of Record filed with this Court.)

Pursuant to the subpoena, petitioner appeared with counsel before the Sub-Committee on February 27th. After being sworn and stating his name, place and date of birth and that he had been served with the subpoena, he declined to answer all questions relating to the records described in the subpoena, claiming his privilege under the Fifth Amendment (Tr. [illegible]), except that the final question and answer were as follows:

> "Q. Mr. Tavenner: (The Committee Counsel.) No sir. You have stated that you refuse to answer any questions pertaining to them. I have not asked you a question that pertains to them. I have asked you to produce the records. Now, will you produce them?
>
> A. Mr. McPhaul: I will not" (Tr. 34).

An indictment against petitioner was returned on July 29, 1954 charging that petitioner was served with a subpoena to produce and that he wilfully failed to produce certain records before the Committee on Un-American Activities of the United States House of Representatives at a hearing held at Detroit, Michigan on February 27, 1952, and thereby violated Sections 192 and 194 of Title 2 of the U. S. C. (Tr. 4).

Petitioner moved to dismiss the indictment on grounds that the indictment and subpoena were insufficient, that the law creating the Committee was unconstitutional and that the subpoena violated petitioner's rights under the Fourth Amendment (Tr. 5). The motion was denied.

Trial commenced on December 18, 1956 and terminated on the following day. The Government called only one witness, Charles E. Potter, U. S. Senator from Michigan, who was at the time of the above-mentioned hearings a member of the House of Representatives and of its Com-

mittee on Un-American Activities. In addition, the Government introduced a number of official documents relied upon to show the authority of the Committee, Congressional approval of the contempt citation and a portion of the transcript of the Detroit hearings of the Committee on February 27, 1952 including the opening statement of the Chairman (Tr. 24-27 and 31-47).

At the conclusion of the Government's case, petitioner moved for a directed verdict of not guilty on the following grounds:

> (a) For all of the reasons set forth in his earlier written motion to disiniss;
>
> (b) There was no evidence that the subpoenaed records were pertinent to the investigation;
>
> (c) There was no evidence that, at the time of the service of the subpoena, the records were in existence;
>
> (d) There was no evidence that petitioner had custody or control of the records (Tr. 51-54).

The motion was denied in an oral opinion (Tr. 54-62) and petitioner offered no evidence.

Petitioner filed written requests to charge the jury concerning the duty of the Government to prove the existence of the subpoenaed records and that they were in petitioner's custody or control (Tr. 74). The Court declined to give such a charge and instead instructed the jury as follows:

> "If you find from the evidence in this case, and beyond a reasonable doubt, that the defendant appeared before the said Sub-Committee, and then refused or failed to make an explanation with respect

to the existence of the records designated in the subpoena, or with respect to whether or not such records were under his possession or control, I charge you that you may not consider the questions of whether the records and documents designated in the subpoena were actually in existence or under the possession or control of the defendant, because if the defendant had legitimate reasons for failing to produce the said records, he should have stated his reasons for non-compliance with the subpoena when he appeared before the said Sub-Committee" (Tr. 67).

"I also charge you that the defendant is not excused from compliance with or producing the records designated in the subpoena merely because he is not designated as an officer or agent of the Civil Rights Congress therein; and neither is the defendant excused from such compliance with the said subpoena merely because of any lack of proof of any connection between the defendant and the Civil Rights Congress" (Tr. 67).

"* * * the only elements of the alleged offense which are now left for you are as follows:

1. Was the defendant summoned to appear by the Un-A...erican Activities Committee of the House or Sub-Committee thereof and to produce certain records of the Civil Rights Congress?
2. Did the defendant appear before said Committee or Sub-Committee thereof?
3. Did the defendant wilfully fail or wilfully refuse to produce the records designated in the subpoena before said Committee or Sub-Committee?" (Tr. 68.)

A verdict of guilty was returned by the jury, and petitioner was sentenced to nine months' imprisonment and to pay a Five Hundred Dollar fine.

ARGUMENT

I.

WHERE PETITIONER WAS TRIED FOR CRIMINAL CONTEMPT FOR FAILURE TO PRODUCE SUBPOENAED RECORDS BEFORE A CONGRESSIONAL COMMITTEE, MAY HIS CONVICTION BE SUSTAINED, CONSISTENT WITH DUE PROCESS AND THE RIGHT TO A JURY TRIAL, WHERE THE GOVERNMENT FAILED TO OFFER ANY EVIDENCE OF THE EXISTENCE OF THE RECORDS OR THEIR POSSESSION BY THE PETITIONER, AND THE TRIAL COURT REFUSED TO SUBMIT TO THE JURY THE ISSUE OF EXISTENCE OR POSSESSION BY THE PETITIONER OF SUCH RECORDS?

The statute under which petitioner was indicted contains two distinct offenses: (1) refusal to answer questions, and (2) wilful default in producing papers. Petitioner was indicted only for wilful default in producing papers.

At the trial the Government introduced evidence to prove that petitioner had been served with a subpoena to produce records of the Civil Rights Congress and that he had appeared before the Sub-Committee but did not produce the records. No evidence was introduced to prove that the records were in existence, that petitioner had any relationship to the Civil Rights Congress[3] or that he had possession or control of the records.

Yet, although wilfulness is made an essential element of the offense, specifically set forth in the statute and

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[3] Exhibit No. 9 was offered by the Government in an effort to prove a connection between petitioner and the Civil Rights Congress. The exhibit purported to be the letterhead of the organization and to contain petitioner's name and signature as Executive Secretary. However, the Government was unable to identify the exhibit as relating to petitioner and it was rejected by the Court as evidence on this issue. (Tr. 47-51.)

charged in the indictment, petitioner was convicted of *wilfully* refusing to produce records which were not shown to have been in existence or within his power to produce.

The significance of "wilfulness" as an essential element of the offense here charged, was pointed out in *U. S. v. Murdock*, 29 U. S. 389, 397, 54 S. Ct. 223, where the Court, in analyzing Sec. 192, said:

> "Two distinct offenses are described in the disjunctive, and in only one of them is wilfulness an element."

At a minimum, in this type of statute, wilfulness denotes the act of a person "who, having a free will or choice, either intentionally disregards the statute or is plainly indifferent to its requirements." *U. S. v. Illinois Cent. R. R. Co.*, 303 U. S. 239, 243, 58 S. Ct. 533. But if the subpoenaed records were not in existence and in petitioner's possession or control, he had no choice; and his failure to produce could not have been a wilful act. Yet the jury was permitted to convict petitioner of wilful refusal without any evidence that petitioner could have produced the records or that such records even existed.

In *U. S. v. Patterson*, 219 F. 2d 659 (C. A. 2nd), the issue, as to whether a person could be convicted of contempt for failure to produce records without proof of their existence and of defendant's possession, was specifically raised and decided. In that case the defendant had previously been convicted of criminal contempt for refusal to turn over to the Federal Grand Jury the records of the Civil Rights Congress. Unlike here, the evidence at Patterson's trial showed him to be Executive Secretary and in charge of the records of the organization. He served a 90-day sentence from July 1st to September 28, 1954.

In October, 1954, following his release, the defendant was again called before the Grand Jury where he again refused to answer any questions concerning the records, claiming the privilege of the Fifth Amendment. His second contempt conviction followed. On appeal, the Court, after finding that there was sufficient evidence that the records were in existence and under defendant's control in June, 1954, concluded that defendant's second conviction should be reversed because the Government had failed to prove existence of the records and control by the defendant in October, 1954 when the defendant again testified before the Grand Jury. The Court held:

> "The decision below rested primarily on a presumption of continued possession and existence held sufficient to constitute a *prima facie* case for the government. Neither the existing precedents nor the facts of the case warrant such a drastic shifting of the burden of proof in a criminal case."

This holding in *Patterson* was cited with approval by this Court in the more recent case of *Nilva v. U. S.*, 352 U. S. 385; 77 S. Ct. 431. *Nilva* involved a conviction for criminal contempt for failure to produce the records of a corporation of which defendant was an officer, pursuant to a subpoena issued to the corporation. The defendant appeared before the Court pursuant to the subpoena; he admitted that he was an officer of the corporation, and brought with him part of the records called for in the subpoena but stated his inability to locate the remaining records. Whereupon the Court ordered all the company records impounded and among these were found the records called for in the subpoena and not produced by the defendant. In its decision affirming the conviction in part, the Supreme Court held that there was sufficient evidence to support the charge that defendant had wilfully failed to produce certain of

the records called for in the subpoena. The Court framed the issue involved as follows:

> "This reduces the case to the charge that petitioner wilfully disobeyed the Court's order to produce certain corporate records required by subpoena No. 160. On that issue, it is settled that a criminal contempt is committed by one who, in response to a subpoena calling for corporation or association records, refuses to surrender *them when they are in existence and were within his control. United States v. Fleischman*, 339 U. S. 349, 70 S. Ct. 739, 94 L. Ed. 906; *U. S. v. White*, 322 U. S. 694, 64 S. Ct. 1248, 88 L. Ed. 1542; *Wilson v. U. S.*, 221 U. S. 361, 31 S. Ct. 538, 55 L. Ed. 771; and see *U. S. v. Patterson*, 2 Cir., 219 F. 2d 659." (At p. 392.) (Our emphasis.)

In its finding on the issue thus framed, the Court held:

> "In our opinion, the evidence reasonably supports the conclusion *that those records were in existence and were within petitioner's control.*" (Emphasis supplied.)

Thus, this Court's most recent decision in this area of law recognized the rule that in criminal contempt, based upon refusal to produce records, the Government must prove that the subpoenaed records were in existence and that they were within the defendant's control.

In the present case no presumption of continued possession, as unsuccessfully asserted in *Patterson*, is possible since there is *no* evidence that the subpoenaed records were ever in existence or that petitioner was ever in possession or control. Indeed, the Trial Court did not base his opinion upon any presumption of possession, but rather on an entirely different legal premise. In denying petitioner's motion for a directed verdict, the Court stated his position as follows:

"Applying the decision in the *Bryan* and the *Fleischman* cases, this Court feels that the defendant now, abiding his time, comes into Court here and offers as a possible defense, or does claim as a defense that there is no proof that these records were in existence or that he had possession or custody of these records, or matters that he should have presented to the sub-committee when he appeared before that committee, and not have raised this defense or made this explanation or rather have raised this issue. Rather than having raised it before the sub-committee, he waits until he comes into Court and has a defense, and offers it as a defense in this case. The Court feels that he cannot do that; he should have given the sub-committee an opportunity to have explored these matters further at that time by questions or otherwise; and that not to have made such an explanation before the sub-committee at the time he appeared does not entitle him now to raise these matters by way of defense in this case.

So, as to those reasons, the Court also holds against the defendant, that it is not incumbent, in view of the record in this case, upon the Government to prove that the records were actually in existence or that the defendant had possession and control of the records" (Tr. 61).

And in his charge to the jury, the Court restated his position as follows:

"• • • I charge you that you may not consider the questions of whether the records and documents designated in the subpoena were actually in existence or under the possession or control of the defendant, because *if the defendant had legitimate reasons for failing to produce the said records, he should have stated his reasons for non-compliance with the subpoena when he appeared before the said sub-committee*" (Tr. 67). (Our emphasis.)

The Court of Appeals accepted this view.

Thus, it was the view of both Courts below that unless a person who is subpoenaed to bring records of an organization asserts before the Committee the non-existence or lack of possession of the records as his reason for not bringing the records, the Government is relieved of its burden, at a subsequent contempt trial of proving their existence and his possession or control. Indeed, under the Courts' holding evidence on these issues could not even be introduced by the defendant. In adopting this position, the Courts here went even further than the Government's position in *Patterson*, where it only contended for a shifting of the burden of proof.

The Trial Court relied on *United States v. Bryan*, 339 U. S. 323, 70 S. Ct. 724, and *United States v. Fleischman*, 339 U. S. 349, 70 S. Ct. 739, to support his conclusion (Tr. 57-62). We believe the Court misunderstood the import of these decisions and that actually both of these cases support petitioner's position. Both the *Bryan and Fleischman* cases involved attempts by the House Un-American Activities Committee to obtain the records of the Joint Anti-Fascist Refugee Committee. In the *Bryan* case the Committee's subpoena was addressed to the Executive Secretary. In *Fleischman* it subpoenaed the members of the executive board. Miss Bryan admitted her official capacity and that the records were in her possession but denied the authority of the Committee to obtain them. In *Fleischman*, the board members admitted their official capacity, advised the Committee that the records were in Miss Bryan's possession, but took the position that each had no authority to act apart from action by the board as a whole, and that, since the board had not taken action, each member was unable to comply with the subpoena.

It will be observed that in both of these cases the official capacity of the defendant and the existence, and some element of control of the records was admitted or shown by the proofs, (*Fleischman*, at Note 3, p. 352), and that the majority and dissenting opinions agreed as to the necessity for such evidence. Thus, neither in *Bryan* or *Fleischman* was the Court called upon to decide, nor did it decide that the Government was exonerated from proof of evidence or control by reason of the witnesses' position before the committee. Indeed, language in the Court's opinion in *Bryan* presupposes that the burden of proof on these issues is always on the Government:

> "But when the Government introduced evidence in this case that respondent had been validly served with a lawful subpoena directing her to produce records *within her custody and control* and that on the day set out in the subpoena she *intentionally failed to comply*, it made out a *prima facie* case of wilful default" (at p. 330). (Our emphasis.)

What this Court actually held in *Bryan* and *Fleischman* was that the defense of lack of a committee quorum could not be raised for the first time at the contempt trial. This, however, cannot mean that *every* defense which a witness asserts at his contempt trial must first be raised and determined by the Committee. Two reasons will serve to point up why this cannot be the rule.

First, there obviously is no purpose in a witness being required to raise before a Committee an issue which the Committee is powerless to determine. The issue which petitioner here raised at his trial was the failure of the Government to present evidence essential to establish its charge of a "wilful" default—evidence of existence of the records and control by petitioner. The Committee, unlike

a Court dealing with a witness brought before it by subpoena, clearly lacked the authority to determine this issue.

Additionally, we deal with a situation where Congress did not elect to call the petitioner before its bar to resolve the issues raised by his refusal and to impose punishment itself (cf. *Jurney v. McCracken*, 294 U. S. 125, 55 S. Ct. 375); instead, it invoked the power of the Court to punish under a statute which requires that the default be found to have been "wilful."

The distinction between these situations is vital. The Court that issues a subpoena has power to make a legal determination of its validity and to impose punishment for a violation of the command of its subpoena. The Congress, when it elects to enforce its own subpoena, possesses a similar power and makes a similar determination. In either instance the tribunal which is to impose the penalty for the alleged violation is the only one competent to hear and to make a *legal* determination of the validity of a defense based upon an absence of wilfulness.

But a Committee has no such power. True, except as the Fifth Amendment may forbid, it may inquire into the existence and possession of the records. But this is done not for the purpose of determining the issue of "wilfulness" under the contempt statute; but, rather, for the purpose of eventually obtaining the records if they can be located.

Again, the issue which gave rise to the holding in *Bryan* and *Fleischman* is altogether different from that presented here. A Committee certainly has power to determine whether or not it has a quorum; and the lack of a quorum, if called to the Committee's attention, can be remedied by the Committee. Fairness to the Committee, therefore, demands that it be apprised at the hearing that a witness

intends to challenge the legal composition of the Committee. Otherwise, such a "procedural" point may be reasonably and properly be said to have been waived. But this rule does not support the holding of the Courts below that a witness waives his constitutional right to a trial at which evidence establishing the elements of the offense must be shown, because he fails to explain to the Committee at the hearing why he is unable to produce the subpoenaed records. Basic constitutional rights may not thus be waived.[4]

The second reason why *Bryan* and *Fleischman* are not controlling on the question here, is that in neither of those cases did the witness claim his Fifth Amendment privilege with respect to questions concerning the existence and possession of the documents. Indeed, in both of those cases the objection or defense based upon absence of a quorum could have been raised before the Committee without any fear that the witness' statement would tend to incriminate him.

Not so, however, with respect to a defense based upon lack of existence or control of the documents. As we show later, the assertion of this defense before the Committee would require that the witness testify. Petitioner here claimed his privilege with respect to "any question which deals with the possession or custody of the books and records called for in the subpoena" (Tr. 34). Clearly, in the setting created by the Chairman's opening statement (Tr. 25-27) and the prior testimony before the Committee (Tr. 19-22), petitioner was justified in invoking his privilege, and the Committee impliedly so ruled (Tr. 34). See *Emspak v. United States*, 349 U. S. 190 and *Quinn v. United States*, 349 U. S. 155.

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[4] See *Johnson v. Zerbst*, 304 U. S. 458, 464. (Courts must "indulge every presumption against waiver of fundamental constitutional rights"); and *Smith v. U. S.*, 337 U. S. 137, 150, ("Waiver of constitutional rights, however, is not lightly to be inferred").

If the view of the law taken by the Courts below in this case were upheld, it would effectively curtail the protection of the Fifth Amendment against self-incrimination: a protection which the Courts have uniformly upheld in recent years against infringement by Congressional Committees. For, with respect to the organizational records of claimed "subversive" organizations, the Committee need only substitute a subpoena duces tecum for the ordinary subpoena and cause the same to be served upon an alleged member. The alleged member-witness could hardly explain the existence or non-existence, his control or non-control of the organization's records, without also being required to explain his relationship to the organization and testify as to his knowledge of its records—information which he could not be compelled to give pursuant to an ordinary subpoena to testify. *Blau v. United States*, 340 U. S. 159, 71 S. Ct. 223.

Under the ruling of the Trial Court, however, such a member-witness, even if he were unable to produce the records, would have to risk either self-incrimination in his answers or be held in contempt for failure to produce the records since the Government would no longer have to prove existence or control and he would be precluded from making an affirmative defense on that ground. Just such a contention was met in *Traub v. U. S.*, 232 F. 2d 43, where the Trial Court's position was stated as follows:

> "A witness who fails to produce all the papers listed in a subpoena is guilty of contempt unless he demonstrates that he is acting in good faith. This demonstration of good faith requires that he answer questions relating to the existence and location of papers he has not produced even though the answers will incriminate him."

The Court of appeals answered this contention—identical to the position of the Trial Court here—as follows:

> "In other words the witness can then choose his own brand of hemlock. He can destroy himself either by failing to produce records called for by a subpoena (even if they are not in his possession or control when the subpoena was served); by refusing to answer questions (even if he has claimed the protection of the privilege); or by giving incriminating answers. This view is plainly untenable."

We have been unable to find a single Court decision in which a conviction for contempt for refusal to produce records pursuant to a subpoena was upheld where there was no evidence that the records were in existence and that the witness was in a position to produce them. In every such case which has come to our attention there was some evidence of existence of the records and ability to produce them. We are constrained to believe that the reason for the absence of any decision supporting the rule of law applied by the Courts below in this case, is the implicit assumption by all Courts that Constitutional due process demands that conviction for "wilful" refusal to produce records requires proof of the existence of the records and of a witness' ability to produce them.

The error made by the Court below in sustaining petitioner's conviction, notwithstanding the record failed to show existence of the subpoenaed documents or his control of them, is compounded by the Trial Court's denial of a jury trial to the petitioner on an essential element of the offense. If, as we have demonstrated above, proof of "wilfulness" required that the Government carry the burden of showing such existence and control, it follows that it was the province of the jury, and not the Trial Judge to

determine if that burden was met. Here, however, the Trial Judge, while submitting to the jury the question of "wilfulness," instructed them:

> "If you find from the evidence in this case, and beyond a reasonable doubt, that the defendant appeared before the said sub-committee, and then refused or failed to make any explanation with respect to the existence of the records designated in the subpoena, or with respect to whether or not such records were under his possession or control, *I charge you that you may not consider the questions of whether the records and documents designated in the subpoena were actually in existence or under the possession or control of the defendant*, because if the defendant had legitimate reasons for failing to produce the said records, he should have stated his reasons for non-compliance with the subpoena when he appeared before the said sub-committee." (Tr. 67.) (Our emphasis.)[3]

What the Trial Court actually did by this instruction was to create a *conclusive presumption* by thus predicating a finding of existence and possession upon proof that the petitioner had failed to make an explanation before the Committee.

But this Court has held that unless a presumption may reasonably be inferred from a proven fact, a conviction based thereon constitutes a denial of due process (*U. S. v. Tot*, 319 U. S. 463). In this case, the only proven fact was petitioner's failure to produce the records. We do not believe that from this fact a reasonable inference can be

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[3] Compare this charge with that given by the Trial Court in *Fleischman* where the Court left to the jury for its determination the question whether the defendant had "control over the records subpoenaed and could have produced the records called for, but wilfully failed and refused to do so" (at p. 378).

drawn that the records were in existence and that petitioner had possession and control."

However, even assuming that petitioner's refusal to produce formed some rational basis for raising an inference of "existence, possession or control," thereby creating some evidence for the jury on these issues, there was no statutory or logical basis for the Trial Court's creating a *conclusive* presumption of existence and possession by withdrawing those issues from the jury. The reasons against such a rule are succinctly stated in *Wigmore on Evidence*, 3rd Ed., par. 2492, as follows:

> "In strictness, there cannot be such a thing as a 'conclusive presumption'. Wherever from one fact another is said to be conclusively presumed, in the sense that the opponent is absolutely precluded from showing by any evidence that the second fact does not exist, the rule is really providing that, where the first fact is shown to exist, the second.

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[6] At one point in his opinion denying petitioner's motion for a directed verdict, the Court referred to petitioner's testimony before the Committee where, in response to the question "Now, will you produce them?", petitioner answered "I will not," and said.

> "This Court feels that that is an absolute refusal to produce the records. At least, it is testimony from which this Court feels an inference may be drawn that this defendant did have the records under his custody or in his possession, and nevertheless refused to produce them. (Tr. 61.)"

The Court, however, eventually concluded that, whether petitioner had possession of the records or not, was not an issue which could be litigated in the absence of an explanation by him to the Committee, and the Court withdrew the matter from consideration by the jury. (See *supra*, pp. 6, 7.) It is petitioner's position, that even if the Court had taken the view that the issue of existence and custody of the records could be litigated, the foregoing testimony was insufficient to submit the issue to the jury since the answer was at least as consistent with innocence as guilt.

[7] See: *Hanson v. U. S.*, 208 F. 2d 914;
People v. Fleisch, 321 Mich. 443.

> fact's existence is wholly immaterial for the purpose of the proponent's case; and to provide this is to make a rule of substantive law, and not a rule apportioning the burden of persuading as to certain propositions or varying the duty of coming forward with evidence."

By his ruling the Trial Court, in effect, eliminated the element of wilfulness from the statutory definition of the offense, and thus made "a rule of substantive law" under which petitioner was convicted.

II.

WAS THE SUBPOENA CONSTITUTIONALLY OBJECTIONABLE FOR THE REASON THAT IT WAS SO BROAD AND ALL-INCLUSIVE AS TO CONSTITUTE AN UNREASONABLE SEARCH AND SEIZURE?

The Fourth Amendment applies to compulsory subpoenas. *Hale v. Henkel*, 201 U. S. 43; *Fed. Trade Com. v. American Tobacco Company*, 264 U. S. 298; *Brown v. U. S.*, 276 U. S. 134. In *Watkins v. U. S.*, 354 U. S. 178, this Court recognized that witnesses called before a Congressional Committee are entitled to the protection of the Fourth Amendment. In enumerating the constitutional rights which such a Committee was required to accord to a witness, the Court said:

> "They cannot be subjected to unreasonable search and seizure" (at p. 188).

In this case, the subpoena called upon the petitioner to produce the following documents:

> "All records, correspondence and memoranda pertaining to the organization of, the affiliation with other organizations and all monies received or expended by the Civil Rights Congress."

It will be observed that the subpoena is limitless as to time[7] and that the documents it seeks are not limited to any claimed scope of inquiry which the Committee might conceivably possess. Assuming, however, that the Committee had a legitimate scope of inquiry concerning communism, the subpoena did not attempt to limit the records subpoenaed even to that extent. The subpoena would compel the production of an unspecified amount of organizational records, unlimited as to time and as to the nature or character of the records sought. In this respect it is similar to the one issued in *Federal Trade Commission v. American Tobacco Company, supra*, which was held to be invalid under the Fourth Amendment. As to such a subpoena, Justice Holmes said:

> "Anyone who respects the spirit as well as the letter of the 4th Amendment would be loath to believe that Congress intended to authorize one of its subordinate agencies to sweep all our traditions into the fire and to direct fishing expeditions into private papers on the possibility that they may disclose evidence of crime. * * *
>
> "It is contrary to the first principles of justice to allow a search through all the respondent's records, relevant or irrelevant, in the hope that something will turn up."

Even if, among the mass of records ~~covered~~ by the subpoena, there might be some which would be pertinent to a proper objective of the Committee's inquiry, yet the scope of the subpoena is so broad as to constitute an unconstitutional search and seizure. In *Annenberg v. Roberts*, 2 A.

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[7] The Government concedes that the subpoena covered a period of six (6) years (Government brief in opposition to Petition for Certiorari p. 12, note 9).

(2d) 612, (Pa.), the Court, in holding similarly broad subpoenas to be unconstitutional said:

> "The subpoenas show on their face that they contemplate an unreasonable search and seizure. They violate the principle which we announced in the American Car Foundry case, 70 Atl. 867, * * * where we held that a *subpoena duces tecum could not properly be issued to have brought in a mass of books and papers in order that there might be a search through them to gather evidence.* We therefore are of the opinion that the subpoenas as issued commanding plaintiffs to produce before the Commission the things therein set forth are void in that they do not show that the demands therein are germane to the inquiry authorized by the Governor's call. * * *[8] (Our emphasis.)

Nor is there any evidence in this record which would justify the compulsory production of this vast array of records. The record is silent as to the content of the records, correspondence and memoranda sought or the purpose for which the monies received and expended were related to the proper objectives of the Committee's inquiry. As the Court said in *Hale v. Henkel, supra:*

> "Doubtless many, if not all, of these documents may ultimately be required, but some necessity should be shown, either from an examination of the witnesses orally, or from the known transactions of these companies with the other companies implicated, or some evidence of their materiality produced, to justify an order for the production of such a mass of papers."

In this case no such necessity was shown before the Committee, nor, indeed, was any shown at the trial.

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[8] For other cases holding similar broad supoenas to be void as constituting an unreasonable search and seizure, see *Hale v. Henkel, supra; People v. Reynolds*, 350 Ill. 11, 182 N. E. 754.

III.

WAS THE EVIDENCE SUFFICIENT TO PROVE THAT THE SUBPOENAED RECORDS WERE PERTINENT TO THE COMMITTEE INQUIRY?

In *Oklahoma Press Pub. Co. v. Walling*, 327 U.S. 186, the power to issue and the right to resist a subpoena duces tecum of an agency of government was considered. The Court defined the right entitled to protection, as follows:

> "The gist of the protection is in the requirement, expressed in terms, that *the disclosure sought shall not be unreasonable*" (at p. 208).
>
> "Beyond this the requirement of reasonableness, including particularity in 'describing the place to be searched, and the persons or things to be seized', also literally applicable to warrants, comes down to *specification of the documents to be produced adequate*, but not excessive, *for the purposes of the relevant inquiry*" (at p. 209). (Our emphasis.)

In the light of these considerations, the Court then went on to consider whether the subpoena on its face and the other evidence was sufficient.[9]

The Court upheld the validity of the subpoena because of "allegations concerning coverage" and the showing that the Administrator "was proceeding with his investigation in accordance with the mandate of Congress and that the records sought were relevant to that purpose" (at p. 216).

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[9] The subpoena, issued by the Administrator of the Fair Labor Standards Act, sought production of the employer's records relating to coverage and to wages paid and hours worked (a subject clearly pertinent to the agency's authority) during a specified period. (See footnote 46 at p. 210 for full language of subpoena.)

Although the issue of the reasonableness of the subpoena in *Oklahoma Press* was framed in terms of the Fourth Amendment, the requirement of reasonableness under the Fourth Amendment, pertinency as an element of due process under the Fifth Amendment (*Watkins v. U. S.*, 354, U. S. 178, concurring opinion J. Frankfurter at p. 217), and definiteness as an essential element of every crime under the Sixth Amendment (*O'Connor v. U. S.*, 240 F. 2d 404), are interrelated and overlapping concepts. Each serves to clarify and buttress the other.

The testimony presented by the Government in this case on the issue of pertinency was taken on a separate record, outside the presence of the jury (Tr. 16-29). The witness, Senator Potter, himself summarized the Government's basic position in the following testimony:

> "As I testified before, the Civil Rights Congress had been declared a subversive organization by the Attorney General.[10] The committee found, along with the Attorney-General, that the Civil Rights Congress was a Communist front organization. The enunciated purpose of our hearings here in Detroit was to determine the extent of Communist activity in the area. Therefore, the Committee subpoenaed the records of the Civil Rights Congress as pertinent to our investigation" (Tr. 22).

The remaining relevant testimony on this issue showed that a witness before the committee had identified an Arthur McPhaul as a member of the Communist Party (Tr. 20), although the Government was unable to identify the petitioner as the person named by the witness (Tr. 28); that the petitioner had appeared before the Commit-

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[10] The Court, on petitioner's prior objection, ruled that he would have to strike the answer with respect to the Civil Rights Congress being a subversive organization unless better evidence was offered (Tr. 18). No better evidence was offered.

tee in response to the subpoena and had claimed the Fifth Amendment privilege with respect to all questions relating to the possession or custody of the records called for in the subpoena (Tr. 31-34).

Applying the yardstick used in *Oklahoma Press* to the foregoing facts to determine the reasonableness of the demand of the subpoena issued to petitioner, and that the specification of the records sought appeared to be relevant to the purpose of the inquiry, we submit that the evidence is insufficient.

In this case the stated object of the inquiry was to determine "whether there has been Communist activity in this vital defense area (Detroit) and if so, the nature, extent, character and objects thereof" (Tr. 26). This amorphous statement of objective is even more vague than "Communist infiltration in labor in Chicago", held insufficient in *Watkins v. U. S., supra* at p. 212, and was far below the specificity of subject matter ("Communism in education and the experiences and background in the party by Francis X. T. Crowley * * * in Michigan, Boston and * * * New York") held sufficient in *Barenblatt v. U. S.*, 360 U. S. 109, 124.

Even if the stated objective were held to be sufficiently clear to apprize the petitioner of the purpose of the inquiry, the only possible link between this objective and the records sought was questionable hearsay evidence that the Civil Rights Congress had been "declared a subversive organization by the Attorney General".[11] But this vague

[11] Compare the extensive evidence concerning the objectives of the organization whose records were subpoened in *Morford v. U. S.*, 176 F. 2d 54, 56 with the lack of proof here. The evidence here does not even show the purpose or objectives of the Civil Rights Congress in Detroit or the manner in which it functioned, other than as its name implied—an organization concerned with problems in the area of civil rights.

nexus is to the organization, not to the records. Without such a nexus there is no evidence here as to the character of the records sought or any indication as to the relationship (pertinency) between these records and the objectives of the Committee's inquiry.[12]

Petitioner, assuming he had possession, would be faced with the necessity of examining every receipt and expenditure of the organization and every record, letter and memoranda dealing with the organization and its affiliation with other organizations covering a period of at least six years, without any guide as to their pertinency other than their possible relationship to the subject of communist activity in the Detroit area. This, we submit, does not meet minimum constitutional standards which a Congressional committee must afford a witness.

The Court below held that since petitioner had "raised no objection on this ground (pertinency) before the Sub-Committee", he could not raise the issue for the first time at his contempt trial (Tr. 78). In *O'Connor v. U. S.*, 240 F. 2d 404 (C.C.A.D.C.) the Court was faced with a similar contention by the Government "that when the accused was before the Sub-Committee he did not complain that the question was too vague". This contention was answered, first by pointing out that "pertinency is made an essential element of the crime", and, second that, in any event, "the Sixth Amendment to the Constitution makes definiteness an essential element of every crime. For this reason definiteness as well as pertinency, must appear at the trial itself.".

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[12] To the extent to which the Government relies on the alleged listing by the Attorney General, it should be noted that the first such list was published in 1947 (13 Fed. Reg. 1471), while the subpoena calls for records from the inception of the organization, at least a year earlier.

Petitioner here had the right to be informed of the purpose of the Sub-Committee's inquiry and of the relationship of the subpoenaed records to that purpose so that he could determine whether the Sub-Committee was acting within its statutory grant of authority and in accordance with the Constitution. We submit that no such showing was made here.

CONCLUSION

The judgment below should be reversed.

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